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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1966

No. 116

In the Matter of the Application

—of—

PAUL L. GAULT and MARJORIE GAULT, father and mother of GERALD FRANCIS GAULT, a Minor,

*Appellants.*

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ARIZONA

## BRIEF FOR LEGAL AID SOCIETY AND CITIZENS' COMMITTEE FOR CHILDREN OF NEW YORK, INC., *AMICI CURIAE*

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ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ARIZONA

## BRIEF FOR LEGAL AID SOCIETY AND CITIZENS' COMMITTEE FOR CHILDREN OF NEW YORK, INC., *AMICI CURIAE*

### Interest of Amici*

Amicus Legal Aid Society has supplied legal representation in all juvenile proceedings in New York City for the past four years to all children whose parents or guardians are financially unable to furnish them with an attorney. In the year ending June 30, 1965, 8,800 of the 11,001 children appearing in New York City in juvenile delinquency and

* The consents of both parties to the submission of this brief, are on file in the office of the Clerk of this Court.

similar proceedings were represented by attorneys on the staff of amicus.[1]

Assignment of attorneys as "law guardians" in juvenile proceedings was mandated by the New York Family Court Act, effective September 1, 1962.[2] The Family Court Act, with the stated purpose of providing "a due process of law" for juvenile cases (section 711), established a code of procedure which also includes provisions respecting detention before and during the proceedings (Art. 7, part 2); notice of the allegations (secs. 736, 737); notification to the child of his privilege to remain silent (sec. 741); exclusion of incompetent evidence in the fact-finding hearing (sec. 744); the judge's statement of grounds for a finding of delinquency (sec. 752); a hearing as to disposition (secs. 743, 745, 746); and the right to appeal (sec. 1012).

While New York has thus provided for protection in a number of the areas in which appellants experienced a deprivation of due process, amici are concerned with the

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[1] Legal Aid attorneys appear for children in all proceedings in the Juvenile Term in New York City of the Family Court of the State of New York. The Juvenile Term has exclusive jurisdiction over cases of neglect, delinquency, and children denominated "persons in need of supervision," who would under the Arizona statute here in issue and the laws of most states be included in the "delinquent" category. The figures in the text above are for delinquency and persons-in-need-of-supervision cases.

[2] Laws of 1962, c. 686 (McKinney's Consolidated Laws of New York, Book 29A), secs. 241-243, 741. The Act was adopted following extensive hearings conducted by a legislative committee throughout the State. See N. Y. Joint Legisl. Comm. on Court Reorganization, Report II (The Family Court Act) 1962. Amicus Citizens' Committee, a voluntary organization established in 1945 for the betterment of services for children, was a vigorous proponent of the Act.

See Isaacs, The Role of the Lawyer in Representing Minors In the New Family Court, 12 Buffalo Law Rev. (1963) 501.

establishment of the requirements of fair procedure as a matter of constitutional right. Avoiding repetition of appellants' arguments, amici will discuss some of the due process questions before this Court on the basis of the experience of the Legal Aid attorneys in juvenile cases.

## Points to Be Presented by Amici

I. The constitutional requirements for a juvenile delinquency proceeding must be determined in part on the basis of its similarities to a criminal prosecution.

II. The right to the assignment of counsel and other rights essential for fairness and equal justice must be accorded in delinquency proceedings.

III. A constitutional right to a hearing must be recognized in a juvenile disposition, whether or not it is required in criminal sentencing.

IV. The Arizona provision as to conduct endangering morals or health violates the due process guarantee because of its excessive breadth and vagueness.

## Statement of the Case

The facts, detailed in appellants' brief, will only be summarized here.

Appellants' fifteen-year-old son, Gerald, was taken into custody and detained because he was suspected of participating with another boy in a "lewd" telephone call, of which a woman in their neighborhood complained. On a petition by a probation officer, alleging on information and

belief merely the general conclusion that Gerald was a "delinquent minor" (R. 80), a superior court judge, sitting as a juvenile court judge pursuant to the Juvenile Code of Arizona, conducted a hearing. No transcript was kept, but the testimony in the instant habeas corpus proceeding shows that the complainant, the recipient of the telephone call, was not present at the hearing. The testimony as to Gerald's admissions at the hearing was conflicting, the favorable version being that he stated he only dialed the telephone number for the call; under the adverse version—that of the juvenile court judge—Gerald admitted making some of the lewd remarks, but not "the more serious" ones (R. 59).

The juvenile court judge held that Gerald was a "delinquent child" within the meaning of the Juvenile Code of Arizona and committed him to the State Industrial School "for the period of his minority unless sooner discharged by due process of law" (R. 82).

The Supreme Court of Arizona, denying the instant petition for a writ of habeas corpus to secure Gerald's release, assumed throughout most of its opinion that the juvenile court's delinquency determination and its authority to commit him to the State Industrial School was based on Section 8-201-6(a) of the Arizona Juvenile Code (see opinion of Supreme Court at R. 83-85, 93-95). The lower court judge who held a hearing in the habeas corpus proceeding made the same assumption (see rulings of Superior Court judge, R. 63, 73). That section of the Juvenile Code provides that a child who violates a state law is a "delinquent child". The Supreme Court, however, also mentions the testimony of the juvenile court judge that he had held Gerald delinquent under both the violation-of-law provi-

sion and under the provision that a "delinquent" includes "a child who habitually so deports himself as to injure or endanger the morals or health of himself or others" (sec. 8-201-6(d)). (See judge's testimony, R. 62; Supreme Court opinion, R. 95.)

## Summary of Argument

### I.

A proceeding against a juvenile based on his alleged violation of law or other alleged misconduct is so similar in substance and import to a criminal prosecution that the fundamental safeguards of justice afforded to adults charged with crime must be observed. For, with a juvenile delinquency adjudication the child is subject to restraint and confinement in State institutions, and also to a stigma and handicap similar in its long range effects to those from a criminal conviction.

The rehabilitative purpose of a juvenile confinement is ineffective to distinguish a delinquency proceeding from a criminal prosecution either factually or for constitutional purposes. The vital point in determining the safeguards required for the individual's protection against a misuse of State power, is whether he is subject to a restraint of liberty. And under this Court's decisions the availability of a constitutional protection is not tied to a rigid distinction between criminal and civil forms of action, but depends on the reasonableness of the discrimination as to the particular safeguard.

## II.

1. In view of the grave potentials of a delinquency proceeding and the significant role for counsel, the principle of *Gideon* v. *Wainwright,* 372 U. S. 335, applies; the constitutional guarantees of due process and equal protection require an offer to assign counsel in delinquency proceedings whenever the child and his parents are unable to employ counsel.

The right to counsel is the assurance in the daily operation of the juvenile court that all of the other rights the child has, whether constitutional or statutory, will be realized. Even under the skeletal Arizona statute, appellants and their son had rights which they were unqualified to assert without an attorney. Nor did Gerald's admission of some involvement in the charged incident gainsay the need for counsel's basic functions, of promoting an accurate determination of the facts through his examining and cross-examining witnesses; presenting legal issues as to the elements of a violation of law; and aiding the child and his parents when the judge considered the crucial issue of the need to commit him.

2. The privilege against self-incrimination, which should be deemed applicable in delinquency proceedings because of their essentially criminal character, has the same general values and effect in juvenile as in adult proceedings.

3. Due process requires formal notice and precise allegations as to the child's delinquency, primarily to afford the child and his parents adequate opportunity to make a defense, and secondarily to focus and clarify the judge's evaluation of the evidence.

In the instant case the lack of clear and definite allegations, coupled with the judge's failure to state his findings or the grounds for the delinquency adjudication, resulted in uncertainty as to its basis which inflicted a further deprivation of due process of law.

4. Arizona's failure to provide for an appeal in juvenile delinquency cases, and thus for a corrective for mistakes, unfairness and inequality in the administration of the law, is a violation of the due process and equal protection guarantees, particularly since an appeal is available in criminal and civil proceedings of similar or less gravity. Habeas corpus is inadequate to protect even the limited rights accorded the juvenile under the Arizona statute.

Even absent the right to appeal, Arizona must, as a matter of due process, make some provision for recording the evidence at juvenile delinquency hearings. Under the present Arizona record-keeping system, a child and his parents are deprived of the opportunity adequately to present even a due process challenge to a delinquency determination.

## III.

Appellants and their son had a constitutional right to a hearing as to the need for his commitment: a right to try to refute or explain whatever adverse facts the judge was considering, and to urge countervailing facts and reasons against his commitment. Due process guarantees a hearing, to avert arbitrariness or false surmises in the crucial determination of whether to remove a child from his parents and confine him in a State institution.

Whether or not a hearing is required in the imposition of a criminal sentence, it is a constitutional requisite in a

juvenile disposition. In delinquency proceedings consideration of the social factors cannot be held a matter of grace, since their primacy furnishes the justification for the denial of the safeguards accorded in criminal prosecutions. Further, only by a hearing requirement as a protection against arbitrariness can the juvenile court judge's relatively unlimited discretion as to commitment be saved from unconstitutionality. Finally, the disposition of a child in a juvenile proceeding affects a greater complex of rights than the criminal sentencing of an adult, for it involves not only the liberty of the child but the interests of the parents in the child and their right to his custody.

## IV.

The Arizona provision as to conduct endangering morals or health, violates the due process guarantee because it grants the judge broad and uncontrolled authority to impose his subjective standards and personal values.

## ARGUMENT

**The determination of delinquency and the commitment to a State institution, as well as the pertinent provisions of the Juvenile Code of Arizona, are invalid under the due process and equal protection guarantees of the Fourteenth Amendment to the United States Constitution.**

### I. The constitutional requirements for a juvenile delinquency proceeding must be determined in part on the basis of its similarities to a criminal prosecution.

Under the Arizona statute, as in most of the States, *the same procedure is used in all juvenile proceedings*, whether arising from the child's condition of "neglect" or "dependency" because of a failure in parental care, or from the child's acts of "delinquency".[3] The latter proceedings, grounded on the child's alleged misconduct, must, we urge, as a constitutional matter be differentiated from the other actions involving the intervention of State power in the child's life and in the parent-child relationship.

The basic similarity of delinquency proceedings, though in form civil, to a criminal prosecution requires that the State accord the child the fundamental safeguards of justice afforded to adults charged with crime. For, the availability of a constitutional protection does not depend on a rigid distinction between criminal and civil forms of action, but on an appraisal of essentials,[4] and of whether

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[3] In New York and a number of other States, juvenile proceedings no longer cover the "dependent" category.

[4] See *Plymouth Sedan* v. *Pennsylvania*, 380 U. S. 693; *Giaccio* v. *Pennsylvania*, 382 U. S. 399; *Jordan* v. *DeGeorge*, 341 U. S. 223, 231; compare *Kingsley Books Inc.* v. *Brown*, 354 U. S. 436, 441-443; *Village of Laurel Hollow* v. *Laverne Originals*, 17 N. Y. 2d 900 (1966).

there is a reasonable ground for the State's differentiation with respect to the particular safeguard.[5]

To the question stirred in *Kent* v. *United States,* 383 U. S. 541, 551, of whether a juvenile charged with a violation of law must be accorded the same protections "accorded to adults suspected of criminal offenses," the answer in some respects must be affirmative.

***Similarities to Criminal Prosecution***

The most obvious similarity between a juvenile delinquency proceeding and a criminal prosecution is that the individual, like Gerald Gault in the instant case, is subject to confinement in a State institution on the basis of a determination that he has violated the law. Though the same hearing procedure is used for all juvenile cases, customarily it is only the delinquent child, as differentiated from the neglected or dependent, who are restrained and confined.[6]

The major benefit to the child from consideration of his alleged violation of law in juvenile rather than criminal proceedings, arises, as indicated in *Kent,* from the fact that the judge has a unitary power of disposition in all delinquency cases—to order commitment for an indeter-

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[5] *Rinaldi* v. *Yeager,* 384 U. S. 305; *Baxstrom* v. *Herold,* 383 U. S. 107, 111-112. A differentiation between minors and adults must be reasonable. *People* v. *Munoz,* 9 N. Y. 2d 51, 60-61 (1961); *Bookcase, Inc.* v. *Broderick,* 18 N. Y. 2d 71, 73 (1966); see *Butler* v. *Michigan,* 352 U. S. 380, 383.

[6] While section 8-231 of the Arizona Juvenile Code gives the judge the power to commit any child within juvenile court jurisdiction to the State Industrial School,—whether dependent, neglected, or delinquent—section 8-314 provides that "the industrial school shall be maintained for the detention, education, employment and reformation of male juvenile offenders. . . ."

minate term until the child's majority.[7] Thus under Arizona law and the law of most states, the juvenile is free from the penalty provisions of the State's criminal law: in particular, from mandatory minimum periods of incarceration, fines, hard labor, or capital punishment. Since, however, the judge's commitment authority is the same no matter how trivial the child's violation of law, the other side of this coin is that he may be confined for a much longer period than an adult committing the same acts. An adult could have been jailed for the violation here in issue for only two months, rather than for six years, which was the remainder of Gerald's minority.[8]

To say that the law violation in a juvenile case merely establishes the court's authority over the child; that a juvenile commitment is based on the child's needs rather than the violation; and that its purpose is to rehabilitate him,—these analyses are ineffective to distinguish a juvenile from a criminal case. Certainly rehabilitation may figure in a criminal court judge's choice of sentence; and conversely the other purposes of incarceration of a criminal—protection of the community through his isolation, and deterrence of law violation—undoubtedly play a role in juvenile commitments along with rehabilitation (e.g., see opinion of court below, R. 96, as to commitment as a

[7] New York is atypical in that the statute prescribes a maximum term of commitment of three years. N. Y. Family Court Act, section 758.

[8] Arizona Revised Statutes (1956) sec. 13-377 provides for a fine of five to fifty dollars and not more than two months in the county jail for certain uses of vulgar and obscene language; section 13-371 (4) provides for a fine not exceeding $200 or imprisonment not exceeding two months for use of obscene epithets.

See *Plymouth Sedan* v. *Pennsylvania*, 380 U. S. at p. 701, comparing the penalties in the civil and criminal proceedings there involved.

means of protecting society, and *In re Lewis*, 11 N. J. 217, 94 Atl. 2d 328, 332, 1953).

In any event, the requirements for fairness in a delinquency proceeding cannot be determined by the motivations for juvenile commitments, or by estimates of whether the institutions for juvenile confinement from time to time and locality to locality keep the promise of individualized rehabilitative treatment. The vital point in determining the safeguards required for the individual's protection against a misuse of State power, is whether he is subject to a restraint of liberty.[9] And a juvenile delinquency proceeding can subject the child to removal from his home and community, restraint within the metes and bounds of an institution, and subjection to its discipline.

Not only in its direct and immediate but in its long-range impact, is a delinquency proceeding similar to a criminal prosecution. For Arizona like other States provides only limited protection against the stigma and handicap implanted by a delinquency proceeding.[10] Throughout the country an especially poignant damage is that young people seeking employment are questioned about years-past juvenile adjudications; there is scant or no assurance

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[9] See *Giaccio* v. *Pennsylvania*, 382 U. S. 399, 402; compare *Gerchman* v. *Maroney*, 355 F. 2d 302, 309-310 (C. A. 3, 1966); *Petersen* v. *Dunbar*, 355 F. 2d 800, 802 (C. A. 9, 1966); *Howard* v. *Smyth*, C. A. 4, Aug. 9, 1966, 35 U. S. Law Week 2095.

[10] See Arizona Juvenile Code, secs. 8-228(A), 228(B), 238.

See *State* v. *Guerrero*, 120 Pac. 2d 798, 801 (Ariz. 1942), as to impeaching use of juvenile commitment in criminal proceeding. Juvenile adjudications are customarily given weight in criminal sentencing. A survey of a number of juvenile courts showed that reports of adjudications for serious violations of law are sent to the Federal Bureau of Investigation. See Note, Juvenile Delinquents, 79 Harv. L. Rev. (1966) 775, 784.

against such investigations in connection with both public and private employment. Indeed, a delinquency adjudication—or even an appearance on a delinquency charge—may dog an individual for the rest of his life in his attempts to secure employment and other opportunities.[11]

Finally, the State has in both delinquency and criminal proceedings a similar interest in fair and accurate determinations. For on this determination depends the selection of the children requiring removal from the community and an allocation of space and care from the State's limited rehabilitative resources, and also, when a serious violation of law is involved, a cessation of the State's effort to apprehend the violator.

* * * * *

In sum, the instant juvenile delinquency proceeding is so similar to a criminal prosecution in substance and impact, that the essential safeguards for fairness and accuracy there constitutionally required should be held applicable here.[12]

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[11] See *Strong* v. *Kennedy*, 29 Misc. 2d 54 (N. Y. Sup. Ct., N. Y. City, 1961), where an applicant for the job of patrolman in the New York City Police Department had been automatically rejected because of a delinquency adjudication at the age of 13, fifteen years prior to his application. The Armed Services generally require as a condition of enlistment that the applicant consent to inquiry of the court as to his juvenile record. See, generally, Lauer, New Directions for Court Treatment for Youth, 12 Buffalo Law Rev. (1963) 452, 462-466; cf. Adolescents and the Courts (publ. by Citizens' Committee for Children of N. Y., Inc., prepared by Leah Marks, 1963), p. 25.

[12] As to the effects of a delinquency proceeding over and beyond those of a criminal prosecution, in that parental rights are involved, see *infra* Point IV.

**II. The right to the assignment of counsel and other rights essential for fairness and equal justice must be accorded in delinquency proceedings.**

### 1. *The Right to Counsel*

Under the decision of the court below, the child and his parents—if unable to afford counsel—have no right to assignment of counsel in a delinquency proceeding; it is even questionable whether they have a right to appear by retained counsel or to receive notification of this right (R. 92-93).

As much or more than in the criminal courts, effectuation of the right to counsel in juvenile proceedings means the right to have counsel assigned.[13] In view of the grave potentials of a delinquency proceeding (*supra*, pp. 10-13) and the significant role for counsel (described below), we believe that the *Gideon* principle applies and that due process and equal protection require an offer to assign counsel in delinquency proceedings whenever the child and his parents are unable to employ an attorney.[14]

Appellants' need for counsel is illustrative of the disadvantages suffered by unrepresented children and par-

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[13] See *supra*, p. 1, as to the percentage of juveniles represented by amicus' attorneys because of lack of means. Prior to assignment of counsel, 92% of the children appearing in juvenile cases were unrepresented in New York City. Schinitsky, The Role of the Lawyer in the Children's Court, 17 Record of Bar Ass'n of City of New York (1962) 10, 15.

[14] See *Gideon* v. *Wainwright*, 372 U. S. 335; compare *People ex rel. Rogers* v. *Stanley*, 17 N. Y. 2d 256 (1966) as to the right of a mental patient to assigned counsel on a habeas corpus petition for his release from commitment for mental illness; for assignment in proceedings that are civil merely in form, see *People* v. *Monahan*, 17 N. Y. 2d 310 (1966); *People* v. *LaVallee*, 20 A. D. 2d 8, 9 (App. Div. 3rd Dept., N. Y. Sup. Ct. 1966).

ents in delinquency proceedings. Even under the skeletal Arizona statute, they have rights which go for naught unless they are represented by counsel. Clearly, appellants were striving to establish Gerald's total or partial innocence and to avoid his commitment. But they were either unaware of, or if aware, felt themselves unable to assert, the procedural rights which might have aided their effort and which, according to the court below, they could have exercised at the juvenile court hearing (see R. 92, 95).[15]

Further, under the Arizona act—and all juvenile court legislation—the judge has authority to adjudicate the child a delinquent and to commit him only if he appears to be within one of the statutory categories of delinquency. Without counsel, Gerald and his parents were ignorant even of this requirement and unable to question whether it was satisfied.[16] The juvenile court judge himself suggested, at the habeas corpus hearing, that the alleged lewd phone call may not have constituted an illegality (R. 61).[17]

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[15] For example, though the court below asserts that appellants had the right to call witnesses and while Mrs. Gault wanted to confront the complainant, she did not press for the latter's appearance (R. 65-66, 8). As to Mr. Gault's frustration at the hearing, see R. 25.

Compare, as to the role of counsel, *Douglas* v. *California*, 372 U. S. 353, 358; *Shioutakon* v. *District of Columbia*, 236 F. 2d 666, 669 (C. A. D. C. 1956); *In re Barkus*, 168 Neb. 257, 95 N. W. 2d 674, 677 (1959); *In re Contreras*, 109 Cal. App. 2d 787, 241 P. 2d 631, 633 (1952).

[16] Due process requires that the determination be supported by at least some evidence. See *Shuttlesworth* v. *Birmingham*, 382 U. S. 87, 94-95, and cases there cited. See *Caruso* v. *Superior Court*, 100 Ariz. 167, 412 P. 2d 463, 466-467 (1966), granting a writ of prohibition because there was "no evidence" to support a determination that a child was "dependent" and the juvenile court therefore had no jurisdiction to "alter the custody or care" of the child.

[17] The judge expressed doubt as to the applicability of section 13-377 of the Arizona Revised Statutes (1956), which punishes certain uses of "vulgar, abusive or obscene language". The only

In addition, a crucial issue of mixed law and fact was presented as to whether Gerald's individual participation in the incident was sufficient to establish a violation of law. The instant delinquency case is typical of many in that it was based on a petty alleged violation of law by several children and in that the child at bar admitted only a minor degree of involvement.[18]

Even when it is clear that some violation of law has been committed by the subject child and that the juvenile court therefore has authority over him, an accurate determination of the facts continues to be significant. While the judges have unitary authority as to disposition in all delinquency cases, they undoubtedly take into account the gravity of the violation, and of any past violations, in determining the need to commit the child.[19] Then too, whether the child's acts amount, let us say, to "grand theft" (see R. 4), or on the other hand assault, or merely disorderly conduct, colors the stigma he suffers.

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other provision mentioned as possibly relevant, A. R. S. sec. 13-371(4), seems clearly inapplicable.

Even from a social welfare standpoint it seems illogical and unsound to base delinquency jurisdiction on the criminal law unless all elements of a violation of law are established. The criterion of anti-sociality for a child, acting with the spontaneity of youth, certainly should be no more severe than for an adult.

[18] See R. 4-5 for another illustration of alleged joint juvenile involvement, though on a graver charge, in the report that Gerald had been "in the company of" a boy charged with theft.

[19] See Allen, *The Borderland of the Criminal Law: Problems of "Socializing" Criminal Justice*, 32 Social Service Review (1958) 107, 117: "However advanced our techniques for determining what an individual is, we have not yet approached the point at which we may safely ignore what he has done. What he has done may often be the most revealing evidence of what he is."

Thus, counsel is needed in a delinquency proceeding like the instant one to perform his basic traditional functions, to promote accurate fact-finding by examining and cross-examining witnesses and to present issues of law. Further, in amicus Legal Aid's experience, the child's attorney participates in the disposition phase—often considerably more than an attorney at a criminal sentencing—questioning statements in probation or psychiatric reports, adducing additional background facts, or suggesting treatment possibilities.

The right to counsel is the only assurance that all of the other rights the child has, whether constitutional or statutory, will be realized in the daily operation of the juvenile court, that the intended limits on the judge's authority and discretion will function.[20] The probation officer, who according to the court below "may be relied upon to protect the infant's interests" (R. 93), here had a particular disqualification as a spokesman for the child in his effort to defend himself. Not only did the probation officer perform his customary role of adviser to the judge (R. 70), but under Arizona procedure he was also the investigator of the alleged violation (R. 48-52) as well as the petitioner calling upon the court to find the child delinquent (R. 50, 80).[21]

The illusion respecting judges and court officials whose perception and wisdom defy the need for procedural limits and protections, must give way to acceptance of the adversary method when the State imposes a grave depriva-

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[20] See *Carnley* v. *Cochran*, 369 U. S. 506, 510.

[21] Compare *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 43-44, 50-51; *Ruiz* v. *Delgado*, 359 F. 2d 718 (C. A. 1, 1966).

tion and restraint. And from the social welfare standpoint, the hope that a non-adversary approach to fact-finding will promote rapport, trust and confidence is, we suggest, unrealistic. Thus, the instant proceeding seemed to result in a sense of confusion, unfairness and victimization. Counsel can rectify to some degree the immense inequality of the child and his parents in their confrontation with State authority in a delinquency case. For, regardless of the judge's admirable purposes, the child in fact is confronting the dominating power of the State; indeed, an incomplete awareness of this reality may, as it apparently did in the instant case, heighten its oppressiveness.[22]

### 2. *The Privilege Against Self-Incrimination*

The privilege against self-incrimination apparently was not mentioned to Gerald prior to his interrogation or his alleged admissions; the court below, without squarely deciding whether the privilege has any application in juvenile proceedings, held that the juvenile court judge was not required "to advise the infant" of the privilege (R. 93).

Since the substance and effect of a juvenile proceeding on a charge of law violation is essentially criminal (*supra*

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[22] Appellants apparently were especially shocked by Gerald's commitment (R. 2, 7), in the context of the judge's apparent benevolence (R. 66).

A policy argument sometimes urged against the child's representation is that his attorney may be in a conflicted and confusing position because the child's ultimate welfare may be served by the disclosure of adverse information. But disclosure of information which the judge could know only if revealed by parents or child may well be deemed consistent with the attorney's duty as an officer of the court. Compare *Brady* v. *Maryland*, 373 U. S. 83, 87; see Dembitz, Ferment and Experiment in New York: Juvenile Cases in the New Family Court, 48 Cornell Law Quart. (1963) 499, 511.

pp. 10-13), we believe, as appellants urge, that its civil form should not work a deprivation of the privilege, and that notice of its availability must be treated as one of its elements in juvenile as in other courts. If a child is subjected to questions which, in his ignorance of the privilege, he apparently must answer, in effect it is denied him and granted discriminately only to the knowledgeable.

Amicus Legal Aid's experience with the privilege, accorded by some judges in juvenile cases in New York even before enactment of the New York Family Court Act four years ago and routinely since then, indicates that it has substantially the same impact and values as in adult cases. Despite the statutory privilege, at least half of the children represented by amicus in delinquency cases admit the charged misconduct. When it is invoked, the effect is to activate the presumption of innocence absent proof of guilt, and to cause introduction of evidence of the alleged delinquent act. The privilege tends to spare a culpable child from the temptation of falsifying testimony in his defense or falsely casting the blame on another child;[23] or from unwillingly disclosing his culpability only to find his truthfulness negatively rewarded, possibly by a commitment. And the child who is innocent but would be an inept witness can be spared from the experience of testifying and possibly contributing to a misjudgment.

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[23] Compare *Ex parte Cummings*, 71 U. S. (4 Wall.) 277, 331; *Ullman* v. *United States*, 350 U. S. 422, 430-431, 438-439.
Respecting the argument that the privilege interferes with the establishment of rapport between the judge and the child, we suggest that compelled testimony does not tend to promote it, and that rapport probably is not a feasible primary goal in the fact-finding phase of a delinquency proceeding.

Recognition of the privilege for juveniles in delinquency proceedings is also significant to insure them against coercive out-of-court interrogation (see *Miranda* v. *Arizona*, 384 U. S. 436). Physical as well as psychological coercion is not foreign to juvenile cases.[24] And from some standpoints the pretrial interrogation of children has particularly grave implications. Because of the helplessness and subordinate status of minors, police and other officials apprehend and question them with relative casualness;[25] and by the same token they are especially vulnerable to authoritative pressure.

### 3. *The Right to Notice of the Allegations and of the Grounds of the Delinquency Determination*

The court below approved the procedure of at first notifying the child and his parents of only a general charge of "a delinquency," and advising them of the alleged supporting facts "no later than the initial hearing" (R. 92). Even if the information given appellants at the hearing had been sufficiently specific—and we submit it was not—such informal oral advice deprived them of an adequate opportunity to make a defense, because of the grave possibility of misinterpretation and confusion.[26] This method

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[24] See *Matters of Gregory W. and Gerald S.*, dec. July 14, 1966, App. Div. (N. Y. Sup. Ct.) 2d Dept., N. Y. L. J. for July 15, 1966, p. 8, col. 8.

[25] Thus, Gerald was in custody for five days and subjected to interrogation (R. 48-49) while his case was being determined (R. 7), though there seems to have been no justification for this detention by either a legal or social welfare standard.

And see *Harling* v. *United States*, 295 F. 2d 161, 163 (C. A. D. C. 1961); *Edwards* v. *United States*, 330 F. 2d 849, 850 (C. A. D. C. 1961).

[26] See appellants' statements that they were unsure of whether Gerald was held under a delinquency charge or as a witness against

of notification violated due process in another respect as well, for appellants were also deprived of the clarity in the judge's evaluation of the evidence that derives from his focus on definite written charges.

Coupled with the lack of clear charges was the failure of the juvenile court judge to make findings or state the grounds for the delinquency adjudication—a procedure which again would have promoted careful and canalized deliberation.[27] In the case at bar, the judge was himself unsure of the basis of his order (R. 61-63, 73). Further, when the grounds are elusive, the child and his parents cannot ascertain whether there is an invalid or arbitrary determination to be redressed, nor can a reviewing court properly consider this issue.[28]

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another child (R. 2, 7). See *In re Post*, 280 App. Div. 268 (N. Y. Sup. Ct. App. Div., 3rd Dept., 1952) and *In re Polak*, 7 A. D. 2d 214 (1st Dept., 1959) for similar reactions to oral notification.

[27] Compare *Kent*, 383 U. S. at p. 561; *Hirabayashi* v. *United States*, 320 U. S. 81, 101-102; *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 432; *United States* v. *Jones*, 360 F. 2d 92, 96 (C. A. 2, 1966).

[28] The reviewing court must consider the basis of a determination to decide its validity. See *Ashton* v. *Kentucky*, 384 U. S. 195, 198; *Cole* v. *Arkansas*, 333 U. S. 196, 202.

The subjective distress to parents and child from their uncertainty should also be considered, as well as the disadvantage in treating the child of ignorance as to the cause for the delinquency adjudication.

It is irrelevant that, as the court below suggested (R. 95), the juvenile court judge might have had the power to commit Gerald on the basis of a revocation of the probation imposed on him in a previous proceeding, due process requiring consideration of what were, rather than might have been, his grounds. (As to the procedural requirements for a revocation of probation, see cases cited *infra*, n. 36).

The court below erred in its opinion that the policy of hiding "youthful errors" (R. 91) could justify the uncertainty and confusion in this proceeding. Moreover, some record of the basis for a court proceeding is inevitable and indispensable; and the imprecision in Arizona practice may well lead to an implication of greater culpability than the child in fact should bear. (See "Juvenile Referral Reports," which in Arizona apparently are a permanent and basic document, R. 4-5, 79).[29]

### 4. *Right to Appeal*

Arizona's failure to provide for an appeal in juvenile delinquency cases, and thus for a corrective for mistakes and inequalities in the administration of the law, is a violation of the due process and equal protection guarantees, particularly since an appeal is available both in civil and criminal proceedings of similar or less gravity.[30]

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[29] The court below also approved the failure to call the complaining witness, stating that confrontation is not required where there is an admission by the child (R. 93). Confrontation was nevertheless essential to secure an accurate and reliable determination of the extent of Gerald's involvement, and to preclude influence on the judge of the probation officer's hearsay report. (A felt need for confrontation was expressed by Gerald's mother, R. 65-66, 8.)

The lower court further held that "clear and convincing evidence . . . of the alleged delinquent act" is sufficient (R. 94). This standard as to quantum of evidence works, we suggest, a denial of equal protection of the laws, in that the child is entitled to the protection of the requirement in criminal proceedings of proof beyond a reasonable doubt.

[30] Arizona's broad provisions for appeals in civil cases permit, among others, an appeal from an adjudication of or commitment for insanity or incompetence. Arizona Revised Statutes, sec. 12-2101-k-2. As to criminal appeals, see Ariz. Rev. Stats., sec. 13-1711 to 1713.

Habeas corpus is inadequate to protect even the limited rights accorded the juvenile under the Arizona statute and the decision of the court below. In the first place, habeas leaves without any remedy the child who is subjected to the stigma of a delinquency adjudication and to State control short of commitment or change of custody. Further, neither State nor Federal habeas affords a corrective for deprivations that do not rise to the jurisdictional or constitutional level (see R. 15, 53); thus, for example, while the only evidence question that could be raised on habeas might well be a total failure of proof (see note 16, *supra*), an appellant would not be so limited.

As the court below indicated (R. 94), provision for recording the evidence at juvenile delinquency hearings seems a necessary corollary of the right to appeal. But in any event we suggest that Arizona must, as a matter of due process, make some such provision. For at present in Arizona a child and his parents are deprived of the right adequately to present even the due process claim of a total failure of evidence to support the delinquency adjudication and to establish authority for a commitment.[21]

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[21] The State procedures must be adequate to protect rights guaranteed by due process. See *Pate* v. *Robinson*, 383 U. S. 375, 378; *Case* v. *Nebraska*, 381 U. S. 336.

The State would not necessarily be burdened, however, with the obligation of recording every juvenile delinquency hearing in its entirety. See Handler, The Juvenile Court and the Adversary System, 1965 Wisconsin Law Rev. 7, 44; compare Annotated Missouri Statutes (Vernon's 1962), sec. 211.211, providing an opportunity for hearing and representation by counsel before a commitment to training school; *Ruiz* v. *Delgado*, 359 F. 2d 718, 721, n. 7 (C. A. 1, 1966) as to the practice of granting a trial *de novo* on appeal from the decision in a summary proceeding.

**III. The constitutional right to a hearing must be recognized in a juvenile disposition, whether or not it is required in criminal sentencing.**

Appellants and Gerald were deprived of due process in that they were not given a hearing on their objections to his commitment—on the need to remove him from his parents and to confine him in a State institution.

The adverse views about appellants and Gerald that were impelling the judge towards his commitment, were not revealed to them; they were uninformed as to what surmises, if any, were taken into reckoning respecting Gerald's school adjustment, family relationships, or other psychological or environmental factors. A very limited social investigation had been conducted by a probation officer some months before (R. 53);[33] if the judge received any report on it, appellants were at no time apprised of its contents.

Appellants had a right to information[34] as to the adverse facts the judge was considering in deciding whether to commit Gerald, a right to try to refute or explain them, and a right to show countervailing facts and reasons

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[33] The probation officer had never even spoken to Gerald's father, nor had he discussed Gerald's behavior and habits with his mother (R. 20, 22, 32-33, 34).

Despite the failure to accord appellants a hearing, the record incidentally furnishes indications of close family ties between Gerald, his brother and his parents, and their care and solicitude for him. See R. 6, 8, 9, 13-14, 22, 28-29, 31, 38, 58.

[34] See *Kent*, 383 U. S. at p. 563. The information must at least be sufficient to permit an attempt to refute or explain adverse facts. Cf. *Willner* v. *Committee on Character*, 373 U. S. 96, 107-108 (concurrence); *United States* v. *Nugent*, 346 U. S. 1, 6.

While the New York act gives the Juvenile Term judge discretion as to the disclosure of probation or psychiatric reports, he almost invariably permits the child's attorney to read them.

against his commitment. Nothing less can stand as a safeguard against misinformation, misinterpretation and arbitrariness. A hearing, for the sake of sound judgment and a reasonable basis for the child's disposition—and thus serving the interests of the child, his parents, and the State as well—is, we urge, mandated by due process. Discretion must not be exercised arbitrarily or on an invalid ground.[35] And the determination of whether to commit is a critical, in fact a crucial stage in a delinquency proceeding, in which arbitrariness or false assumptions cannot be risked. In Gerald's case, for example, the judge had been wavering as to the need for commitment (R. 70), and the showing the appellants might have made at a hearing might well have been decisive against it.

Even if a hearing is not constitutionally required in the imposition of a criminal sentence,[36] it should be deemed requisite in a juvenile disposition. For, the reliable determination of the social background facts has greater primacy in juvenile proceedings than in criminal. While these factors are subject to consideration in criminal sentencing as well as the crime, the evaluation of the child, his relation-

[35] See *Yellin* v. *United States*, 374 U. S. 109, 120-121; *Vitarelli* v. *Seaton*, 359 U. S. 535.

[36] See *Williams* v. *New York*, 337 U. S. 241. Compare, as to the right to a hearing on sentencing, *Commonwealth* v. *Myers*, 397 Pa. 596, 156 Atl. 2d 804, 807 (1959); on revocation of probation, *United States* v. *Register*, 360 F. 2d 689 (C. A. 4, 1966) and *Ex parte Rixen*, 19 N. W. 2d 863 (N. Dak. 1945); in the issuance of other orders for confinement, *Miller* v. *Blalock*, 356 F. 2d 273 (C. A. 4, 1966) and *Gerchman* v. *Maroney*, 355 F. 2d 302 (C. A. 3, 1966).
See Wyzanski, A Trial Judge's Freedom and Responsibility, 65 Harv. Law Rev. (1952) 1281, 1291, suggesting that in spite of *Williams*, a sentencing judge "should never take into account any evidence, report or other fact which is not brought to the attention of defendant's counsel with opportunity to rebut it".

ships, and his environment goes to the very heart of a juvenile proceeding. The basic justification for modifying criminal procedure in juvenile cases is to permit emphasis on individualized treatment, on the child's needs *rather* than his illegal acts.

Thus in juvenile proceedings consideration of the social factors cannot be held a matter of grace, as it is sometimes said to be in criminal sentencing. For, unless a delinquency proceeding is designed to insure a social welfare purpose, the denial of any of the safeguards accorded in criminal prosecutions would violate due process and equal protection.[37] Certainly here there was not the careful consideration of Gerald's individual situation and treatment needs which might justify the failure to accord him such safeguards.

There is a further compelling distinction between a juvenile disposition and criminal sentencing, from the standpoint of a hearing requirement. The juvenile court judge possesses relatively unlimited discretion as to commitment —as illustrated by his commitment of Gerald for, in effect, an indeterminate term of six years following a trivial offense. Only by a hearing requirement, as a protection against arbitrary exercise of this broad power and an assurance of its use for its intended purpose of soundly individualized treatment, can it be saved from unconstitutionality.

Finally, the disposition of a child in a juvenile proceeding involves a greater complex of rights than the criminal

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[37] See *Kent*, 383 U. S. at p. 551. Compare *In re Rich*, 216 Atl. 2d 266, 269 (Vt. 1965) declaring it unconstitutional to commit a child, on the basis of juvenile proceedings, to a penal institution.

sentencing of an adult. Not only the child, but also his parents are directly and gravely affected. We refer not merely to the emotional impact on the parent of his child's adjudication or commitment and to the stigma the parent suffers,[38] but to the effect on the parent's legally cognizable interest in the child's development and in retaining his custody.[39] A hearing as to their child's disposition,—desired by all parents except for those submerged in hopelessness—is therefore their right under the due process guarantee.

**IV. The Arizona provision as to conduct endangering morals or health is excessively broad and vague, and the adjudication of delinquency thereunder violated the due process guarantee.**

The juvenile court judge testified (R. 61) that his determination of Gerald's delinquency was based in part on the Arizona provision that a "'Delinquent child' includes . . . A child who habitually so deports himself as to injure or endanger the morals or health of himself or others" (sec. 8-201-6(d)).

No argument is needed to show that it was a violation of due process to render an adjudication against Gerald wholly or partly on a ground as to which not even a semblance of notice or hearing was given. Besides the pro-

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[38] The stigma may have practical consequences for the parent, in connection, for example, with the evaluation of the family upon its application for public housing. Cf. *Manigo* v. *N. Y. C. Housing Authority*, dec. August 9, 1966, N. Y. Sup. Ct., N. Y. Cnty., 35 U. S. Law Week 2097.

[39] See *Armstrong* v. *Manzo*, 380 U. S. 545; *Kesseler* v. *Kesseler*, 10 N. Y. 2d 445 (1962); *Arizona State Dept. of Public Welfare* v. *Barlow*, 80 Ariz. 249, 296 Pac. 2d 298, 300 (1956) as to the parents' rights; Dembitz, op. cit. supra n. 22 at pp. 518-519.

cedural deficiency, this statutory basis for delinquency jurisdiction on its face violates due process. For it gives broad and unchanneled power to the judge to impose his subjective standards, and to assert authority to commit a child on the basis of his personal values and individual interpretation of the statute.[46]

## CONCLUSION

It is respectfully submitted that the judgment of the Supreme Court of Arizona be reversed, with directions that the appellants' application for a writ of habeas corpus be granted and that the adjudication of delinquency and the order of commitment be invalidated.

Respectfully submitted,

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[46] As to the vagueness of the statutory criteria, compare *Burstyn* v. *Wilson*, 343 U. S. 495, 504; *United States* v. *Cardiff*, 344 U. S. 174, 176.